(3)

No. 05-1458

IN THE

Supreme Court of the United States

GEORGE WEBB

Petitioner,

v.

LEVEL 3 COMMUNICATIONS, LLC,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Although the Tenth Circuit Court of Appeals correctly stated the summary judgment standard in its unpublished Order and Judgment in this case, did the court misapply the standard by not properly taking into account:

   a. Petitioner, George Webb's ("Webb") views of his own qualifications as compared with his views of other employees of Respondent, Level 3 Communications, LLC ("Level 3");

   b. Webb's argument with respect to the criteria used by Level 3 in selecting Webb to be laid off as part of a reduction in force ("RIF");

   c. Prior employment events that occurred approximately a year and a half before Webb was laid off; and

   d. Events that occurred after Webb was laid off?

(This restates Nos. 1, 2, 3, 4, and 9 of Webb's Questions Presented.)

2. Did the court misapply the correctly stated summary judgment standard by:

   a. Not considering Webb's evidence as a whole;

   b. Not drawing all reasonable inferences from the evidence in Webb's favor;

c. Explicitly or implicitly determining issues of credibility; and

d. Not conducting a "sensitive inquiry" as to Webb's discrimination claim?

(This restates Nos. 5, 6, 7, and 8 of Webb's Questions Presented.)

3. Did the court misapply the correctly stated summary judgment standard when it held that Webb had not established a prima facie case of retaliation because he had not shown any causal connection between the protected activity and the adverse employment action?

(This restates No. 10 of Webb's Questions Presented.)

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Level 3 Communications, LLC's parent company is Level 3 Communications, Inc.

Because Level 3 Communications, LLC is a limited liability company, it does not have any stock. Level 3 Communications, Inc. is the only publicly held company that holds an ownership interest of 10 percent or more in Level 3 Communications, LLC.

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INTRODUCTION

Supreme Court Rule 10 provides: "A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." Sup. Ct. R. 10. This is the only type of error Webb asserts in his Petition for a Writ of Certiorari ("Petition"). Although Webb identifies 10 "Questions Presented," each is based on a single underlying argument: that the Tenth Circuit, in affirming the grant of summary judgment against Webb and in favor of Level 3, misapplied the summary judgment standard by giving too little, or too much, probative value to certain purported "facts." (*See* Pet. at ii-iii; 11-12.) Accordingly, the questions presented in the Petition are not appropriate for certiorari review.

In addition, none of the reasons given in Rule 10 for granting review applies to the questions presented in the Petition. Webb makes no attempt to argue that the Tenth Circuit's decision conflicts with a decision "of another United States court of appeals on the same important matter," or "by a state court of last resort. . . ." Sup. Ct. R. 10(a). Similarly, although Webb claims to discern a "trend" among federal courts "to limit discrimination plaintiffs' rights to present circumstantial evidence in opposition to motions for summary judgment" (Pet. at 16), Webb does not contend – even looking at the Tenth Circuit's decision through his own, distorted prism – that in this case the court "so far departed from the accepted and usual course of judicial proceedings" as to require "an exercise of this Court's supervisory power. . . ." Sup. Ct. R. 10. Thus, Webb also fails to advance any reason why, under the guidelines delineated in Rule 10, the Petition should be granted.

Moreover, the overarching claim of error by Webb – that the Tenth Circuit in this case subverted the correct summary judgment standard – is simply wrong. Despite his professed obeisance to this Court's description of the proper standard for summary judgment, Webb never examines, quotes, or cites, Rule 56 or any of the Court's trilogy of seminal summary judgment decisions: *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). Had he done so, he would have been forced to

acknowledge that the Tenth Circuit's decision is entirely consistent with Rule 56 and *Celotex*, *Anderson*, and *Matsushita*. Thus, Webb's argument is not really – as he pretends – that courts of appeals are not correctly applying the proper summary judgment standard. It is that the proper summary judgment standard imposed a burden he was unable to meet.

Further, Webb distorts the record in this case, and the Tenth Circuit's rulings based on the record. In truth, the reason the district court granted summary judgment, and the court of appeals affirmed that decision, is not because those courts misapplied the correct summary judgment standard. It is because Webb was unable to produce sufficient evidence (because no evidence existed) that would have allowed a jury to find that the proffered reason Webb was laid off was pretextual. Thus, although Webb pretends that he was deprived of his claims due to judicial error, in reality Webb's claims were dismissed because of a failure of proof.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

In late 1997, Webb was hired as a Senior Network Developer by a predecessor of Level 3. At the time Webb was hired, he was 55 years old. Webb initially worked for Level 3's predecessor in California, but relocated to Colorado in August 2000. Between January 1998 and June 2001, Webb had at least four supervisors. Webb testified in deposition that he suffered no disparate treatment from any of them because of his age.[1]

In June 2001, Level 3 went through the first of a series of reductions in force ("RIF"), and Webb was notified that "[his] employment or [his] position was being eliminated, and that [he] would no longer have a job effective . . . September 9th

1. Although Webb did not bring a claim of gender discrimination, he opined that an early supervisor, Elsa Svensson ("Svensson"), discriminated against him based on gender. But Webb had no **evidence** of discrimination; his allegation was due to the fact that he "felt that since [he] was the only male working for her . . . [he] might be held to a different standard." In fact, Webb testified that Svensson did not treat Webb differently than his coworkers because of his age.

[2001]."[2] Webb ultimately was not laid off, however, because he was transferred to Level 3's Customer Operations department as a "program manager". The transfer, by Webb's own admission, was a lateral transfer. Webb testified that he did not experience any discrimination while working in the Customer Operations department. In fact, although Level 3 went through several additional RIFs between June 2001 and January 2003, Webb survived all of them.

After working in the Customer Operations department for more than a year, Webb concluded that his position did not fully utilize his abilities. On November 14, 2002, Webb met with a representative in Level 3's Human Resources department ("HR") named Blake Isom ("Isom"). The sole reason for the meeting was that Webb wanted to seek "assistance from HR in finding opportunities that could better utilize [his] experience and expertise. . . ." During the meeting, Isom asked Webb, "Have you ever been discriminated against [at Level 3]?" In his deposition, Webb said that he "believe[d]" he told Isom that "a case could probably be made for it." Webb, however, neither intended nor expected Isom to conduct an age discrimination investigation. Isom likewise did not understand that Webb was claiming age discrimination, or that Isom should undertake an investigation on behalf of Webb. Isom did not take any action or discuss his conversation with Webb "with any managers or employees in Customer Operations. . . ."

On January 16, 2003, more than two months after Webb met with Isom, Level 3 went through another RIF. Forty-nine employees – 25 who were under the age of 40 and 24 who were 40 years or older – were laid off. Webb was among the employees

2. Webb stated (after filing the first of his lawsuits against Level 3) that his inclusion in the June 2001 RIF was "the first time that [he] started feeling like age might be impacting [his] employment in any way." Webb had no basis for his "feeling," which is contrary to the facts. At the time of the June 2001 RIF, Level 3 employed two Senior Network Developers: Webb and a female employee in her mid-30s. Webb was able to transfer to a lateral position in another department, but the employee in her 30s was not, and was laid off. Further, Webb's implication – that the person who included him in the June 2001 RIF might have discriminated against him – rings hollow in light of the fact that Webb could not even identify that person.

who were laid off. The person who decided to include Webb in the 2003 RIF was Tim Leddy ("Leddy"), the same person who, a year and five months earlier, had decided to hire Webb to work in the Customer Operations department. Leddy – who was himself 45 years old at the time of the RIF – submitted an affidavit stating that he did not know Webb's age in making the decision to place Webb "among the individuals [Leddy] decided to include in the RIF." Likewise, Leddy did not know about "Webb's alleged complaints regarding his employment (specifically, that he claims he was treated unlawfully because of his age). In fact, [Leddy] was unaware that [Webb] had even talked to Human Resources regarding any workplace issues."

When the January 2003 RIF was announced, Webb was offered the choice of a severance package or a retirement package. The retirement package option expired in 45 days, and Webb decided not to accept it. Thirty-seven days after the retirement option expired, Webb changed his mind and submitted to HR a "formal request to retire from Level 3. . . ." Because Webb had "retained legal counsel with regard to [his] claims concerning [his] separation from employment," HR referred Webb's request to Level 3's legal department. Thereafter, Webb's request for retirement benefits was denied because it was untimely.

After Webb was laid off, he applied for several jobs at Level 3 – including a job for the position of Program Manager – but he did not receive an interview. Although Webb has brought a separate EEOC Charge – and a second age discrimination lawsuit which is currently pending in federal court, *see Webb v. Level 3 Commc'ns, L.L.C.*, No. 05-cv-773-RPM-BNB (D. Colo. filed Apr. 27, 2005) – based on Level 3's post-termination failure to hire him, Webb also alleged in this case that the failure to hire showed that his inclusion in the RIF was based on discrimination.

II. PROCEDURAL HISTORY

On October 7, 2003, Webb filed a lawsuit against Level 3 in the United States District Court for the District of Colorado against Level 3. Webb alleged claims for discrimination and retaliation in violation of the Age Discrimination in Employment

Act, 29 U.S.C. §§ 621-34 (2006) ("ADEA"). On April 1, 2004, Level 3 moved for summary judgment on Webb's claims.

On January 11, 2005, the district court granted Level 3's motion. The court found that although Webb had established a prima facie case of age discrimination, Level 3 had produced a legitimate, non-discriminatory reason for Webb's discharge – a RIF – and "no reasonable jury could conclude that Mr. Webb's employment was terminated for any reason apart from a reduction in force." (Supp. App. at 30a.) The court also found that (a) Webb had failed to establish a prima facie case of retaliation because he had "offered no evidence as to a causal connection" between the protected action and the adverse employment action (*id.* at 31a); and (b) even if Webb had presented a prima facie case of retaliation, Level 3 had produced evidence of a nondiscriminatory reason for Webb's termination and Webb had "not offered sufficient evidence from which a reasonable jury could conclude that Level 3's reason is pretextual." (*Id.*)

Webb appealed. On January 25, 2006, the United States Court of Appeals for the Tenth Circuit affirmed the district court's grant of summary judgment.

III. FACTUAL ERRORS IN THE PETITION

Supreme Court Rule 15(2) provides that respondents "have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in the petition." Level 3 identifies the following misstatements in the Petition.

1. Webb asserts that Level 3 hired Webb "to tap into his expertise in a certain technical area" (Pet. at 2), and that Webb "was so informed by Level 3. . . ." (*Id.*) Neither assertion is supported by any evidence. (*See* App. at 15a-16a ("Webb [argues that] Level 3 initially hired older employees in order to 'milk' their expertise. . . . Webb has presented no evidence to support his conspiracy theory.").)

2. Webb claims that he "directly observed that the company was made up primarily of males in their 20s and 30s, and the number of employees older than that was in the low single digits. This was an objectively observable fact." (Pet. at 2-3.) Webb's contention is erroneous, and illustrates the fallacy in Webb's

persistent portrayal of subjective opinions as objective facts. Although Level 3's workforce (like that of many telecommunications companies at the time) was comparatively young, Webb's claim that he "directly observed" that the percentage of employees 40 or older was "in the low single digits" is an egregious exaggeration. At the time of the January 2003 RIF, 28.2 percent of Level 3's workforce was 40 or older. (App. at 8a.)

3. Webb claims that in *Abuan v. Level (3) Communications, Inc.*, 353 F.3d 1158, 1165 (10th Cir. 2003), a jury finding of age discrimination "was upheld upon evidence of a young work force with little senior oversight." (Pet. at 2.) Webb mischaracterizes the basis on which the court upheld the jury verdict in *Abuan*. In *Abuan* – which, unlike this case, did not involve a RIF but involved the demotion of an employee during a time when Level 3 was "actively recruiting new employees," 353 F.3d at 1169 – the court's evaluation of the sufficiency of the evidence did not rely on, discuss, or even mention the age of the workforce. *See id.* at 1168-70.[3]

4. Webb asserts that he learned that the RIF criteria that Level 3 announced "were not applied to him at all." (Pet. at 3.) "Instead," Webb argues, "a human resources manager informed plaintiff that he had been terminated because his position had been eliminated. This directly contradicted the announced RIF criteria." (*Id.*) There is no inconsistency between the announced RIF criteria and a statement that Webb's position had been eliminated. In the January 2003 RIF, one Program Manager II position – Webb's – was eliminated. The selection of Webb's position (as opposed to another employee's Program Manager II position) was based on specified RIF criteria. In fact, Level 3's application of its RIF criteria was examined at length by the Tenth Circuit. Webb's attempt to create a contradiction fails. (*See* App. at 12-14a.)

5. Webb argues that he was the only Program Manager II older than 45 years of age who was included in the RIF. (Pet. at 3.) Webb's use of the "45 years old" cutoff is misleading. The

3. In its discussion of the facts, the court repeated testimony that Level 3's workforce was young. That testimony was not relied on in evaluating the sufficiency of the evidence. *Id.* at 1165.

ADEA protects individuals who are 40 years of age and older; and four of the eight employees (including Webb) with the title of Program Manager II were 40 years of age or older.[4]

6. Webb claims that several employees under the age of 40 with whom Webb had worked, and whom he had "directly observed" were not laid off even though they had not worked for Level 3 as long as Webb had. (*Id.* at 3-4.) The Tenth Circuit found that Webb "failed to provide any specific facts" supporting his belief that he had more seniority and experience, and made superior contributions, than his peers. (App. at 13a.) The court stated: "There is virtually no evidence in the record, aside from vague generalities and speculation, as to the qualifications of Webb's peers." (*Id.*) Further, Webb never attempted to show that the individuals to whom he is referring in this cryptic statement were comparators.

7. Webb asserts that "[w]hile working at the company, [Webb's] formal performance evaluations were excellent, i.e. 'at or above' expectations." (Pet. at 4.) Webb's evaluations were generally, but not uniformly, favorable. (Supp. App. at 23a (Fact No. 10).) Further, Webb provides no evidence comparing his evaluations to those of other employees.

8. Webb argues that the favorable reviews he received constitute "strong evidence in a discrimination case. . . ." But "in a RIF a record of positive performance reviews is generally unpersuasive evidence of age bias because 'even capable employees are released when an employer is down-sizing.' " *Brown v. McDonnell Douglas Corp.*, 113 F.3d 139, 142 (8th Cir. 1997) (quoting *Hutson v. McDonnell Douglas Corp.*, 63 F.3d 771, 781 (8th Cir. 1995)); *accord Rea v. Martin Marietta Corp.*, 29 F.3d 1450, 1456 (10th Cir. 1994) (quoted at App. at 13a.).[5]

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4. The Tenth Circuit says that "Webb was one of seven individuals who held the position of Program Manager II" and that "four were under the age of forty, and three were over forty years of age." (App. at 12a.) This enumeration does not include Webb himself.

5. In fact, if positive performance evaluations are evidence of anything, they are evidence of no discriminatory animus, since it is unlikely that a company would praise an employee against whom it was prejudiced, just so it could then take discriminatory action against him or her. *See Stidham v. Minn. Mining & Mfg., Inc.*, 399 F.3d 935, 940 (8th Cir. 2005).

9. Webb expresses the belief that his transfer in 2001 from the Network Development department to the Customer Operations department "made him vulnerable to RIF termination." (Pet. at 4.) Webb concedes that this belief is "subjective," but contends that his inclusion in the January 2003 RIF transforms his belief into "an objective fact." (*Id.*) The fact that Webb was included in a RIF after his transfer does not mean he became "more vulnerable" as a result of the transfer. Indeed, the undisputed facts establish just the opposite. If Webb had not transferred to the Customer Operations department, he would have been laid off a year and a half earlier, in the June 2001 RIF. Further, the Tenth Circuit found that Webb had "presented no evidence to support" the argument that his 2001 transfer made him more vulnerable to a subsequent RIF, and that is was "based purely upon speculation, and speculation is insufficient to raise a genuine issue of material fact as to pretext." (App. at 15a-16a.) Still further, even if one were to accept Webb's speculation that his 2001 transfer made him more vulnerable to a RIF in 2003, that fact would not be probative in any way of age discrimination. To make such a causal leap, one would have to assume that when Webb was hired laterally in June 2001, the person who hired him – Leddy – was sufficiently prescient to realize that in a year and a half, (a) Level 3 would have another RIF,[6] (b) the January 2003 RIF would affect the Customer Operations department more heavily than the Network Development department, and (c) Leddy would, at that time, have the opportunity to lay off Webb. If Leddy had such discriminatory animus, it would have been much simpler for him simply not to hire Webb for the lateral position. As this Court emphasized in *Matsushita*, "if the factual context renders [a party's] claim implausible . . . [the party] must come forward with more persuasive evidence to support [his] claim. . . ." 475 U.S. at 587.

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6. Leddy stated in his affidavit that at the time he hired Webb, he had no knowledge about any subsequent layoffs in January 2003. Thus, the undisputed evidence – as well as common sense – demonstrates that Webb was not transferred so that he would be more vulnerable to layoff a year and a half later.

10. Webb asserts that when he was transferred to Customer Operations in 2001, "contrary to routine the company then provided no planning for [his] future career progression, as it did for other, younger employees." (Pet. at 5.) The assertions that Level 3 had a "routine" practice of planning for its employees' "career progression," and that Level 3 planned for the future career progression of its younger employees, are unsupported by the record.

11. Webb states that "Elsa Svensson, in her mid-30s," had "no prior experience in network development and no prior experience as a supervisor, as she readily conceded." (*Id.* at 5.) This statement is unsupported by the record. Webb did not introduce Svensson's "prior experience" into the record, and he did not introduce evidence that Svensson "conceded" a lack of experience.

12. Webb contends that "[n]inety percent of plaintiff's peers," all of whom were under 40, received promotions while Webb did not. (*Id.* at 5-6.) The Tenth Circuit found that Webb's allegations about unfair promotions were unsupported by the record:

> Webb offers the names of ten individuals whom he contends are younger and less experienced but received promotions. The record contains virtually no evidence as to the specific qualifications of each of these individuals, and the little evidence Webb presented was based on hearsay, vague generalities, and speculation. Webb also failed to identify, with any detail, when these promotions occurred and how these prior incidents are connected to his termination in the January 2003 RIF.

(App. at 9a.) Further, Webb testified in deposition that the only basis for his claim of discrimination in promotion was that the people who were promoted to the level of director were younger than he was. Still further, all of the individuals Webb identified worked in Level 3's Network Development department, which Webb left in 2001. As the district court found, Webb "offer[ed] no evidence to connect these prior instances of alleged discrimination with Mr. Leddy's decision to include him in the [RIF]." (Supp. App. at 29a.)

13. Webb states that on November 14, 2002, he went to HR to "register his concerns" about discrimination. (Pet. at 6-7.) This assertion about the reason for Webb's meeting with HR is contradicted by Webb's deposition testimony. Webb testified at deposition that the sole reason for the meeting with HR was that Webb wanted "assistance from HR in finding opportunities that could better utilize [his] experience and expertise. . . ." Webb also states that during this meeting, he expressed the view that Level 3 was "a company dominated by younger males and that the company had a disproportionately low number of older males." (*Id.* at 7.) This assertion is contrary to the record.

14. Webb states that the HR representative "took handwritten notes during plaintiff's discussion about discrimination, but said notes have never been found." (*Id.* at 7.) This is incorrect. The notes were typed up, and the typed notes were identified in Level 3's disclosures and made available for inspection and copying.

15. Webb makes several statements about an employee named Jason Pearce ("Pearce"). (*Id.* at 7-8.) These statements concern the June 2001 RIF, and not the January 2003 RIF when Webb was laid off. (*See* App. 15a.) Webb also attributes statements about Webb's superior experience to Pearce. (*See, e.g.*, Pet. at 8 ("Plaintiff had been Pearce's 'mentor' and 'teacher,' according to Pearce himself.").) Pearce, however, provided no testimony in this case. Thus, Webb's attribution of statements to Pearce either are unsupported by the record, or are based solely on hearsay (statements by Webb about what Pearce purportedly said to Webb).

16. Webb contends that "[t]he sole explanation for the RIF selection of plaintiff was completely subjective." (Pet. at 8.) The court found that Webb, yet again, failed to present evidence supporting his assertion, and that the record showed otherwise. (*See* App. at 13a-14a ("Webb has not shown that Leddy's decision was based entirely upon subjective criteria. Rather the

evidence indicates that Leddy considered both objective and subjective criteria.").)[7]

17. In response to Level 3's motion for summary judgment, Webb presented an affidavit in which he, for the first time, told a story about a meeting with Leddy (after Webb was discharged), in which Leddy "spontaneously asked [Webb] if he thought he had been discriminated against." Webb contends this question raises an issue of pretext. Ignoring the questionable veracity of Webb's fortuitous remembrance, the question is not probative of discrimination by Leddy. *See* Fed. R. Evid. 401. (*See also* App. at 19a ("Assuming Leddy made such an inquiry after Webb's termination, we do not believe a reasonable juror could infer, from that statement alone, that Leddy had knowledge of Webb's prior meeting with Isom.").)[8]

18. Webb claims that although he was offered the option of early retirement, when he attempted to select that option, he was referred to Level 3's legal department "because plaintiff had hired a lawyer." The legal department then denied Webb's request for early retirement. Webb's claim ignores the facts that (a) the option of early retirement – offered to all employees who were subject to the January 2003 RIF – expired 45 days after it was offered, (b) Webb initially declined to apply for the option, and (c) it was only after the option expired that Webb changed his mind and attempted to select the early retirement option. Further, as the Tenth Circuit recognized, because the denial decision occurred after Webb's layoff and was made by a different individual in a different department, it was "not sufficiently connected to his termination to demonstrate pretext." (App. at 11a.)

REASONS FOR DENYING THE PETITION

Webb's Petition should be denied for the following reasons: First, the questions it presents are based on a supposed

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7. Webb also asserts that Leddy's "only pertinent statement of analysis" was that " 'I considered input from Mr. Webb's direct supervisor, Davetta Garcia.' " (Pet. at 8.) In truth, Leddy presented an affidavit to the district court that provided additional detail. Moreover, Webb elected not to take Leddy's deposition.

8. Moreover, Webb fails to mention that in response to this question, he did not claim discrimination.

misapplication by the Tenth Circuit of the correct summary judgment standard, and certiorari review is "rarely granted" based on such an asserted error. Moreover, Webb does not assert that any of the reasons set out in Rule 10 for granting a petition apply here. Second, Webb's assertion that the court of appeals failed to properly apply the correct summary judgment standard is based on (a) Webb's purposeful ignorance of the law governing summary judgment – Webb does not examine, discuss, review, or even cite to any of this Court's trilogy of seminal summary judgment decisions, and he does not discuss, review, or cite to Rule 56 – ; and (b) a blatant mischaracterization of the factual record in this case. If the applicable summary judgment standard is applied to the actual facts, it becomes evident that the court properly applied the summary judgment standard. Accordingly, the Petition advances no reason why certiorari review would be appropriate here.

I. THE PETITION SHOULD BE DENIED BECAUSE THE QUESTIONS IT PRESENTS MERELY ASSERT THAT THE TENTH CIRCUIT MISAPPLIED THE SUMMARY JUDGMENT STANDARD.

In his Petition, Webb does not dispute that the Tenth Circuit delineated the correct summary judgment standard in its opinion. Nor could he; the court expressly quoted the standard set forth in Rule 56. "Summary judgment is appropriate," the court stated, " 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' " (App. at 4a (quoting Fed. R. Civ. P. 56(c).) Further, the court articulated the proper perspective for reviewing summary judgment evidence. " 'We view the evidence, and draw reasonable inferences therefrom, in the light most favorable to the nonmoving party.' " (App. at 4a (quoting *Combs v. PriceWaterhouse Coopers LLP*, 382 F.3d 1196, 1199 (10th Cir. 2004) (citation omitted)); *see, e.g., Immigration and Naturalization Serv. v. Abudu*, 485 U.S. 94, 101 (1988) (" 'On summary judgment the inferences to be drawn from the underlying facts contained in such materials must be viewed in the light most favorable to the party opposing the motion.' ")

(citing *U.S. v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)). Thus, the Tenth Circuit "properly stated" the "rule of law" applicable to summary judgment motions.

Nonetheless, Webb argues that the Tenth Circuit erred because it misapplied the applicable summary judgment standard. First, Webb asserts, the court gave insufficient credence to evidence, favorable to him, showing (1) inconsistency and subjectivity in the application of RIF criteria; (2) the "young age of the company's workforce;" (3) Webb's personal comparison of himself with younger employees; (4) prior acts against Webb; and (5) post-termination acts against him. (Pet. at 12-13.) Second, Webb contends, the court misapplied the summary judgment standard by ruling that (1) "[t]he decision to terminate [Webb] was in part objective and that defeats a showing of pretext;" and (2) "after [Webb's] termination, his duties were divided up among other employees, and that defeats a showing of pretext." (Pet. at 13.)

Webb mischaracterizes both the "evidence" and the Tenth Circuit's rulings. More significantly for purposes of ruling on the Petition, however, the purported errors claimed by Webb are nothing more than allegations that Rule 56 was misapplied. For instance, Webb criticizes at length the Tenth Circuit's ruling – which is consistent with decisions over more than a decade by other circuit courts of appeal[9] (and with other decisions by the Tenth Circuit) – that Webb's personal beliefs about the superiority of his own qualifications compared to the qualifications of other employees are insufficient to create a genuine issue of material fact as whether the reasons given for including Webb in the RIF were pretextual. But Webb's criticism is simply another way of saying that the court did not properly apply the summary judgment standard because it failed to draw

9. *See, e.g., Curby v. Solutia, Inc.*, 351 F.3d 868, 874 (8th Cir. 2003); *Simms v. Okla. ex rel. Dep't of Mental Health and Substance Abuse Servs.*, 165 F.3d 1321, 1329 (10th Cir. 1999); *Shorette v. Rite Aid of Me., Inc.*, 155 F.3d 8, 15 (1st Cir. 1998); *Ost v. W. Suburban Travelers Limousine, Inc.*, 88 F.3d 435, 441 (7th Cir. 1996); *Nichols v. Loral Vought Sys. Corp.*, 81 F.3d 38, 42 (5th Cir. 1996); *Holt v. KMI-Cont'l, Inc.*, 95 F.3d 123, 129 (2nd Cir. 1996); *Johnson v. U.S. Dep't of Health and Human Servs.*, 30 F.3d 45, 47 (6th Cir. 1994).

all "reasonable inferences" from Webb's characterization of his qualifications. Similarly, Webb criticizes the Tenth Circuit because it supposedly "weighed and discounted" certain unsubstantiated allegations – which Webb incorrectly calls "circumstantial evidence" – including such things as "the background level of a workforce dominated by young people with little senior supervision, a prior reassignment of [Webb] to a job that made him more vulnerable to layoff; [and the] failure thereafter to provide career planning typical for other, younger employees. . . ." (Pet. at 25-26.) Again, however, the court's purported weighing and discounting of this "evidence" implicate nothing more than the way the court applied the correctly articulated summary judgment standard.

The same is true of each of the 10 questions presented by the Petition. Each addresses the correct way for a court to **apply** the standard for summary judgment. The first question asks whether a court should discount an employee's "evidence of his own qualifications and performance . . . as mere opinion." (Pet. at ii.) The second question asks whether it is error for a court to conclude that an employer's "total deviation from announced criteria for [a] reduction in force" was insufficient to prove pretext. (*Id.*) The third asks whether a court misapplies the summary judgment standard if it rules that "prior acts against plaintiff and in favor of others outside the protected class" are not relevant to prove pretext. (*Id.*) The fourth asks whether a court conclusion that "subsequent acts against an employee after termination . . . are relevant to prove pretext" is error. And on and on. Characterized fairly, each question does nothing more than challenge a supposed ruling that, according to Webb, misapplied the correct standard for summary judgment. As such, each assertion of error consists of – at most – the "misapplication of a properly stated rule of law" for which review is "rarely granted." Sup. Ct. R. 10.

II. THE PETITION SHOULD BE DENIED BECAUSE NONE OF THE REASONS SET FORTH IN RULE 10 FOR GRANTING A PETITION APPLIES HERE.

Nor does this case presents one of the "rare" instances that might justify review of a court of appeals' alleged "misapplication of a properly stated rule of law." This is a garden-variety age

discrimination case. It does not raise unusual or complex questions of law, it does not present unsettled issues, it does not require consideration of new or novel analyses, and it does not concern legal questions about which other courts disagree. In fact, this case does not implicate – and Webb does not even attempt to argue that this case implicates – any of the guidelines identified in Rule 10 as "indicat[ing] the character of the reasons the Court considers" in granting certiorari review. Sup. Ct. R. 10.[10]

A. The Tenth Circuit's Decision Does Not Conflict with the Decision of Another United States Court of Appeals on the Same Important Matter, or a Decision by a State Court of Last Resort.

Rule 10 recognizes that certiorari review may be granted where a court of appeals (a) issues a decision that conflicts "with the decision of another United States court of appeals on the same important matter," or (b) decides "an important federal question in a way that conflicts with a decision by a state court of last resort. . . ." Sup. Ct. R. 10. Neither situation exists here. Webb's Petition indisputably does not assert a conflict between the Tenth Circuit's decision in this case, and a decision by a state court in another case. In fact, Webb's Petition does not cite to a single state court decision, conflicting or otherwise.[11]

Likewise, Webb's Petition does not assert a conflict between the decision here and decisions by other court of appeals. Indeed, the opposite is true. Webb argues that the Tenth Circuit is **following** the lead of other appellate courts in supposedly misapplying the proper summary judgment standard. (*See* Pet. at 14-15 (repeated assertion that "an increasing number of courts of appeals" are misapplying the correct standard for summary judgment) (capitalization and emphasis omitted).) Webb identifies several rulings by the court in this case, and then cites consistent decisions over the past 10 years by the Tenth Circuit or other courts of appeals. *See, e.g., id.* at 22 (criticizing Tenth

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10. In his Petition, Webb never once discusses, quotes from, paraphrases, or cites to Rule 10.

11. Because no state court decision is at issue, the guidelines for certiorari review in Rule 10(b) and (c) are also inapposite. *See* Sup. Ct. R. 10(b), (c).

Circuit for "adopt[ing] a rule of law previously created by Seventh Circuit" and citing consistent decision by Eleventh Circuit); *id.* at 24 (describing " 'mere opinion' line of cases from Tenth Circuit and from other circuits" as "a *de facto* variety of [a] new rule of law" in Eighth and Ninth Circuits); *id.* at 17 (citing consistent decisions by Ninth and Eighth Circuits). Thus, Webb does not complain of inconsistent rulings by other appellate courts; he complains of **consistent** rulings by them.

B. The Tenth Circuit's Decision Is Not Such a Departure from the Accepted and Usual Course of Judicial Proceedings as to Require an Exercise of the Court's Supervisory Power.

Under Rule 10, this Court also considers granting certiorari review when a court of appeals "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power. . . ." Sup. Ct. R. 10. That is not the situation here.[12] The Petition itself demonstrates that the Tenth Circuit's decision is not a dramatic departure from "accepted and usual" decisions by other courts. As noted previously (*see supra* §II.A), the Petition complains that the court's decision in this case is in **accordance** with accepted and usual decisions of other courts, not that it is a far departure from them.

III. WEBB'S ASSERTION THAT THE TENTH CIRCUIT IN THIS CASE FAILED TO FOLLOW ESTABLISHED LAW GOVERNING SUMMARY JUDGMENT MOTIONS IS WITHOUT MERIT.

Rather than attempt to argue that his Petition should be granted because the questions it presents fall within the guidelines identified in Rule 10, Webb apparently believes the Court should grant the Petition because the Tenth Circuit's ruling epitomizes what Webb perceives as a massive groundswell of judicial insubordination by federal courts. According to Webb, the Tenth Circuit in this case (and other federal circuit courts in similar cases), is refusing to follow established precedent by

12. To the extent this guideline is directed toward procedural irregularities, it is inapposite on its face because Webb does not identify any irregularity in the judicial proceedings themselves.

this Court delineating the proper application of Fed. R. Civ. P. 56. As a result, Webb implies, this Court should grant the Petition to quell the judicial insurrection by the Tenth Circuit (and the other courts of appeal).[13]

Webb's view that the Tenth Circuit in this case failed to follow established precedent is legally and factually erroneous. The decision by the court in this case is entirely consistent with Rule 56 and this Court's summary judgment decisions. Accordingly, the Petition presents no reason why certiorari review would be appropriate.

A. This Court Delineated the Correct Summary Judgment Standard in *Celotex*, *Anderson*, and *Matsushita*.

Twenty years ago, this Court issued a trilogy of cases – *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986) – that addressed the purposes of, and standards for, summary judgment. A principal purpose of Fed. R. Civ. P. 56, the Court declared, "is to isolate and dispose of factually unsupported claims or defenses. . . ." *Celotex*, 477 U.S. at 323-24; *see also Matsushita*, 475 U.S. at 587 ("purpose of summary judgment is to 'pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial' ") (quoting Fed. R. Civ. P. 56(e) advisory committee's note (1963)). Accordingly, the Court concluded, Rule 56 "should be interpreted in a way that allows it to accomplish this purpose." *Celotex*, 477 U.S. at 324.

The Court then outlined the correct interpretation of Rule 56. A party moving for summary judgment must demonstrate to the district court that " 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the

13. Even if the Court were to conclude that courts of appeals have, in certain cases, misapplied the correct summary judgment standard, the Court should still deny the Petition. Regardless what other appellate courts may be doing, in **this** case the Tenth Circuit correctly applied the summary judgment standard. Thus, a grant of certiorari review here, for the purpose of instructing other appellate courts in other appellate cases, would be nothing more than an advisory opinion.

affidavits, if any,' " show that " 'there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.' " *Celotex*, 477 U.S. at 322 (quoting Fed. R. Civ. P. 56(c)). When the moving party makes a proper showing, the nonmoving party – if it bears the burden of proof at trial – must "go beyond the pleadings and by [its] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.' " *Id.* at 324.

The obligation of a nonmoving party to show a factual dispute "has two components." *Matsushita*, 475 U.S. at 586. The dispute must be material, and it must be and genuine. *See Anderson*, 477 U.S. at 247-48 (the Rule 56 standard "provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact") (emphasis in original)). A disputed fact is material when it "might affect the outcome of the suit under the governing law. . . ." *Id.* at 248. Thus, "[f]actual disputes that are irrelevant or unnecessary" are not material and "will not be counted." *Id.*

A disputed issue of fact is genuine when it is sufficient to allow a reasonable jury to return a verdict for the nonmoving party. *Id.* at 249. Evidence that "is merely colorable, or is not significantly probative," will not create a genuine issue, and "summary judgment may be granted." *Id.* at 249-50 (citations omitted); *see also Matsushita*, 475 U.S. at 587 ("When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. In the language of the Rule, the nonmoving party must come forward with 'specific facts showing that there is a *genuine issue for trial*.' ") (citations omitted) (emphasis in original). Likewise, evidence that is based on speculation "does not create a *genuine* issue of fact; instead, it creates a false issue, the demolition of which is a primary goal of summary judgment." *Lexington Ins. Co. v. W. Pa. Hosp.*, 423 F.3d 318 (3d Cir. 2005) (quoting *Hedberg v. Ind. Bell Tel. Co., Inc.*, 47 F.3d 928, 932 (7th Cir. 1995) (emphasis in original)).

Under Rule 56, therefore, judges are not " 'required to submit a question to a jury merely because evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury in finding a verdict in favor of that party.' " *Anderson*, 477 U.S. at 251 (citations omitted). Rather, "in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury could properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed." *Id.*

B. Webb's Claim That the Tenth Circuit's Opinion Is Contrary to *Reeves* Is Without Merit.

As noted previously, although Webb contends that the Tenth Circuit erroneously applied the corrects standard for summary judgment, he does not discuss *Celotex*, *Anderson*, or *Matsushita*. Rather, Webb relies solely on *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), in which this Court evaluated the standard (which is identical to the summary judgment standard) for ruling on a motion for judgment as a matter of law under Fed. R. Civ. P. 50.[14] Webb claims that the Tenth Circuit failed to follow:

> the teaching of *Reeves*, supra, that questions of fact are to be approached the same in discrimination cases as in other cases. *Id.*, at 148. "It therefore follows that, in entertaining a motion for judgment as a matter of law, the court should review *all* of the evidence in the record." *Id.*, at 150. [emphasis added]. ". . . In so doing, however, the court must draw all inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *Id.*

(Pet. at 23.)

14. To the extent Webb intends to suggest by his exclusive reliance on *Reeves* that its standard differs from the standard in *Celotex*, *Anderson*, and *Matsushita*, that suggestion is untenable. This Court clearly saw no substantive difference; the Court cited all three of the summary judgment decisions in *Reeves*, and it cited *Anderson* multiple times.

Webb's argument that the Tenth Circuit's decision is contrary to *Reeves* is based on a misreading of the court of appeal's decision and a mischaracterization of the "evidence" Webb presented. For example:

- Webb contends that "the Tenth Circuit was required to take as true that plaintiff had previously been evaluated by the company as 'at or above' expectations" and that the court violated *Reeves* when it failed to do so. (*Id.*) But the Tenth Circuit expressly found that "overall Webb's performance met or exceeded expectations."[15] (App. at 2a.) The Court did not find – because there was no evidentiary basis for finding – that Webb's positive evaluations demonstrated pretext. (*See supra* at 10 ¶ 8 & n.5.)
- Webb claims that the Tenth Circuit "violat[ed] the tenants of *Reeves*" when the court rejected the allegation that Webb's firing contravened the announced RIF criteria, on the ground that a purported inconsistency identified by Webb was "insignificant." (Pet. at 25 (citing App. at 7a).) As shown below, the court neither weighed the evidence nor stated that Webb's allegation of an inconsistency was "insignificant." (*See* §III.C.2, *infra* & n.17.) Rather, the court found that Webb had failed to show an inconsistency.
- Webb asserts that he presented "other forms of circumstantial evidence," including "the background level of a workforce dominated by young people with little senior supervision, [and] a prior reassignment of plaintiff to a job that made him more vulnerable to layoff. . . ." (Pet. at 25.) Webb argues that the Tenth Circuit violated the standard set forth in *Reeves* by "weigh[ing] and discount[ing]" this "circumstantial evidence." (*Id.*)

15. Webb surely is not suggesting that a court must take such an assertion by an employee as true if an employer produces the actual performance evaluations, and they show that the employee received lower ratings.

But again, the Tenth Circuit did not weigh or discount any evidence. Rather, it concluded that these allegations either were "based purely upon speculation" (App. at 16a), or insufficient, without more, to "create an inference of discrimination." (*See* App. at 8a.) Both of these conclusions are consistent with *Reeves*, and with *Celotex*, *Anderson*, and *Matsushita*. Indeed, Webb's reliance on *Reeves*' analysis under Fed. R. Civ. P. 50 to argue that the Tenth Circuit should have given greater weight to such things as Webb's speculation about the effect of his transfer on his vulnerability to future layoffs is ironic. Because such speculation by Webb would not be admissible at trial, it would never be considered in a motion under Rule 50.

C. The Tenth Circuit Properly Applied the Summary Judgment Standard in This Case, and Thus the Petition Provides No Basis for Reversal.

In this case, the district court and the court of appeals both determined that the purported "evidence" presented by Webb was insufficient to allow a jury to return a verdict in favor of him. (App. at 20a; Supp. App. at 31a.) And examination of the issues underlying the "questions presented" by the Petition demonstrates that those courts were correct. Accordingly, not only does the Petition fail to present any question for which certiorari review is appropriate, it does not even present a basis for reversal of the Tenth Circuit decision.

1. *An employee's belief about his own qualifications and performance is insufficient to create a dispute as to a genuine issue of material fact.*

The first question presented in the Petition concerns the probative value of an employee's belief as to his or her own qualifications and performance as compared with other employees.[16] Webb's contends that he "well-established [sic]:

16. Because Webb's characterizations of the "Questions Presented" are one-sided, Level 3 rephrases them in what it considers a more neutral manner.

(1) his own qualifications, based upon his own direct knowledge of them; (2) the qualifications of comparators, who disclosed those qualifications to him; (3) his own performance, as expressed in performance evaluations by the company; [and] (4) the performance of comparators, as he directly observed it on the job. . . ." (Pet. at 18 (emphasis omitted).) Webb argues that the evidence he produced on these subjects was sufficient to establish that his inclusion in the RIF was pretextual, and the Tenth Circuit misapplied the correct summary judgment standard when it refused to consider these "objective assessments" on the ground that they were "inadmissible opinion." (*Id.* (emphasis omitted).)

Webb misstates both the evidence he presented and the Tenth Circuit's rulings. The court did not hold that evidence by Webb about the qualifications and performance of comparators could not be considered in determining whether his layoff was pretextual. *See Ash v. Tyson Foods, Inc.*, 126 S. Ct. 1195, 1197 (2006). In fact the Tenth Circuit has held in multiple cases that evidence of a disparity in qualifications may be sufficient to create a question of fact as to pretext. *See, e.g., Brooks v. Barnhart*, No. 02-1449, 78 Fed. Appx. 52, 55-56 (10th Cir. Oct. 7, 2003). Rather, in this case the Tenth Circuit found that Webb did not present sufficient evidence about the qualifications and performance of other employees:

> Webb has failed to provide any specific facts for this conclusory statement [that he had more seniority, more experience, and superior contributions when compared to his peers]. There is virtually no evidence in the record, aside from vague generalities and speculation, as to the qualifications of Webb's peers.

(App. at 13a.) Indeed, the Tenth Circuit's finding is generous to Webb. Not only did he not present evidence about the qualifications of individuals he deemed to be comparators, he did not present evidence showing that the individuals he identified were in fact comparators.

Similarly, the Tenth Circuit did not rule that Webb's performance evaluations were inadmissible opinions. What the court found was that in the context of a RIF, evidence of satisfactory performance alone is not probative of pretext

because " 'someone has to be let go, . . . including satisfactory employees.' " (App. at 13a (quoting *Rea v. Martin Marietta Corp.*, 29 F.3d 1450, 1456 (10th Cir. 1994)). And because Webb, once again, failed to produce any evidence of the performance evaluations received by supposed comparators of Webb, the court had no basis for concluding that a genuine issue of material fact existed about whether Webb's layoff was pretextual because his evaluations were significantly superior to those of his comparators.

The Tenth Circuit did conclude that Webb's subjective beliefs about the superiority of his own qualifications and performance (or the inferiority of the performance of other employees) was insufficient to prove pretext. (App. at 13a.) But that has to be the case. If an employee could create a triable issue of fact merely by expressing a heartfelt belief that he or she was more qualified or performed better than other employees, summary judgment would never be granted.

2. *Webb failed to show that Level 3 deviated from the RIF criteria.*

The second question presented in the Petition concerns an employer's alleged deviation from the established criteria in determining whether an employee will be included in the RIF. Webb contends that Level 3 "announced one set of criteria for selecting employees to be laid off (performance, skills, qualifications, tenure)" but then "informed plaintiff he was being laid off, instead, for a different reason – his job had been eliminated." (Pet. at 25.) Webb contends that the Tenth Circuit's label of this change as a "minor inconsistency" demonstrates that the court "*weighed*" the evidence, violating basic summary judgment law. (*Id.* (emphasis in original).)

Once again, Webb misreads the court's decision. The court did not dismiss Webb's assertion on the ground that the supposed change in criteria was a "minor inconsistency."[17] It did so on

17. Webb's "minor inconsistency" assertion is unwarranted, and completely misrepresents the Tenth Circuit's analysis. (*Compare* App. at 7a (quoting *Beaird v. Seagate Tech., Inc.*, 145 F.3d 1159, 1168 (10th Cir. 1998), for "minor inconsistency" standard) *with App.* at 12a-14a (evaluating Webb's claim of deviation from criteria without mentioning "minor inconsistency").)

the ground that Webb's assertion – even if accepted as true – did not show an inconsistency between the announced RIF criteria and the statement that Webb's position had been eliminated. In the January 2003 RIF, one Program Manager II position – Webb's – was eliminated by Level 3. The selection of Webb's position (as opposed to another employee's Program Manager II position) was based on specified RIF criteria. Accordingly, the two statements are completely consistent with one another, and no reasonable jury could find that they were evidence of pretext.

3. *Webb failed to present evidence of prior discriminatory acts, and he failed to present evidence of a causal connection between the prior acts and the decision to include him in the 2003 RIF.*

Webb characterizes the third question in the Petition as whether evidence of prior acts of discrimination against him is relevant to prove pretext. But that issue is not implicated here. The Tenth Circuit did not hold, in this case or any other case of which Level 3 is aware, that evidence of prior acts of discrimination against a party is never relevant to establish pretext. Rather, the court held in this case, as it has held in numerous other cases over the past 20 years, *see, e.g.*, *Colon-Sanchez v. Marsh*, 733 F.2d 78, 81 (10th Cir. 1984), that evidence of prior discriminatory acts against a party can establish pretext if " 'the prior incidences of alleged discrimination can somehow be tied to the employment actions disputed in the case at hand.' " *Heno v. Sprint/United Mgmnt. Co.*, 208 F.3d 847, 856 (10th Cir. 2000) (quoting *Simms v. State of Okla.*, 165 F.3d 1321, 1330 (10th Cir.1999); (*see* App. at 9a, 10a.) Here, the Tenth Circuit found that Webb's allegations of prior discrimination were insufficient to establish pretext for three reasons: they were unsupported by evidence, Webb failed to make any showing of a connection between the prior allegations and his inclusion in the January 2003 RIF, and the alleged events were too remote in time to demonstrate pretext. (*See* App. at 9a-11a.)

4. *Webb's claim of post-layoff discrimination in the denial of retirement benefits was unsupported by evidence and was unconnected with the decision to include him in the 2003 RIF.*

The fourth question presented in the Petition is "[w]hether subsequent acts against an employee after termination, such as denial of retirement benefits, are relevant to prove pretext." (Pet. at ii.) Webb's attempt to use post-layoff events to prove pre-layoff discrimination founders for two reasons. First, Webb, once again, failed to produce evidence from which a jury could find that the events were due to discrimination. For example, Webb claims that the denial of retirement benefits was discriminatory. But Webb cannot dispute that he was notified that the option to receive retirement benefits would expire, that Level 3 never attempted to prevent Webb from exercising the option before it expired, and that Webb did not try to exercise that option until more than a month after it expired. *See Trotter v. Todd*, 719 F.2d 346, 349 (10th Cir. 1983) (no prima facie case where defendants complied with internal policy). Thus, to show that the decision to deny his untimely request for option benefits was due to discrimination, Webb would have to produce evidence that other employees – who were outside the ADA's protected class and who were subject to the RIF – were allowed to receive retirement benefits pursuant to the option when their requests were made untimely, even though Webb was not. Needless to say, there is no such evidence.

Second, for post-discharge actions to be probative of pretext, they, just like prior actions, must be causally connected to the discharge. But here, no causal connection existed. (Pet. at 11a.) The decision to deny Webb's untimely request for retirement benefits was not made by Leddy – the person who included Webb in the RIF – and there is no evidence that Leddy even knew about the decision. Accordingly, the Tenth Circuit correctly found that the post-termination actions about which Webb complains, such as the denial of his request to exercise untimely the early retirement option, are not probative on the issue of pretext.

5. *The implications Webb attempts to make with his rhetorical "questions presented" are baseless.*

Four of the 10 questions presented in the Petition are rhetorical. They ask whether, in a discrimination case: (a) circumstantial evidence must be considered as a whole; (b) all reasonable inferences should be drawn in the nonmovant's favor; (c) a court should conduct a "sensitive inquiry" as to discriminatory animus and pretext, and (d) issues of credibility should not be determined by the court. (Pet. at ii-iii.) And although Webb uses these rhetorical questions to imply that the Tenth Circuit did not follow basic summary judgment standards, that implication is false. First, the court's decision demonstrates on its face that the court considered the evidence as a whole. After exhaustively evaluating Webb's allegations, the court of appeals concluded: "**Based on the foregoing**, Webb has failed to present sufficient evidence of pretext to preclude summary judgment on his age discrimination claim." (App. at 16a (emphasis added).) Second, the Tenth Circuit expressly recognized its obligation to draw all reasonable inferences in Webb's favor. (*See* App. at 4a.) Third, the care taken by the Tenth Circuit in evaluating the evidence demonstrates that it performed a "sensitive inquiry" into Webb's claims. Although the decision was unpublished, the court's opinion is 20 pages long. (*See* App. at 1a-20a.) And fourth, the decision discloses that the court did not determine issues of credibility. Nowhere did it reject evidence presented by Webb on the ground that it was not credible. To the contrary, even where the court could have legitimately rejected evidence by Webb – such as Webb's belated recollection of a meeting with Leddy, *see Orta-Castro v. Merck, Sharp & Dohme Quimica P.R., Inc.*, 447 F.3d 105, 110-11 (1st Cir. 2006) – the Tenth Circuit did not do so. Instead, it accepted the evidence presented by Webb as true, and evaluated his claims based on it.

6. *The Tenth Circuit correctly found that the RIF criteria were not completely subjective.*

The penultimate question presented in the Petition is based on Webb's assertion that the criteria used in determining the employees to include in the RIF were "substantially subjective." According to Webb, this demonstrates pretext. (Pet. at iii.) Webb

misstates the rule concerning the use of subjective criteria. Pretext "is ordinarily inferred 'only when the criteria on which the employers ultimately rely are *entirely* subjective.' " *Platero v. Williams Field Servs. Co.*, No. 05-2006, 2006 WL 864851, at *3 (10th Cir. Apr. 5, 2006) (emphasis in original) (quoting *Jones v. Barnhart*, 349 F.3d 1260, 1267-68 (10th Cir.2003)). Here, as Webb's question presented implicitly concedes, "Leddy considered both objective and subjective criteria." (App. at 14a.)

Moreover, "[t]he inference of pretext in this context is based on the idea that a decision-maker could cloak his bias in an unassailable subjective judgment. Thus, when a subjective decision is made by someone *whose motives have been put in question in the case*, an inference of pretext may be appropriate." Slip Op. at 3, *Platero*, No. 05-2006 (original emphasis partially omitted). But the motives of the decision maker who included Webb in the RIF – Leddy – have never been "put in question." (*See* Supp. App. at 23a) ("There is no evidence that Mr. Leddy decided to include Mr. Webb in the 2003 reduction in force because of his age."). In fact, the opposite is true. Leddy himself was a member of the same protected class as Webb; which would tend to negate any inference of prejudice. And Leddy was also the same person who, a year and a half earlier, had made the decision to hire Webb. This fact, as numerous courts have recognized, creates " 'an inference that discrimination was not the employer's motive in terminating the employee.' " *Cartagena v. Aegis Mortgage Corp.*, No. 01-20324, 275 F.3d 46 (5th Cir. 2001) (not selected for publication) (*quoting Faruki v. Parsons S.I.P., Inc.*, 123 F.3d 315, 320 n.3 (5th Cir. 1997). Accordingly, the mere fact that some of the criteria used in selecting employees for inclusion in the RIF were subjective is insufficient for a jury to find that Webb's inclusion was discriminatory.

7. *The Tenth Circuit correctly affirmed the district court's grant of summary judgment on Webb's retaliation claim on the ground that no causal connection existed between the protected activity and the adverse employment action.*

The final question presented in the Petition concerns the correct elements of a claim for retaliation. In his complaint,

Webb alleged that his inclusion in the RIF was in retaliation for his charge, made to Isom in November 2002, that Webb had been the victim of discrimination. The district court granted summary judgment on Webb's retaliation claim, which the Tenth Circuit affirmed, on the ground that the undisputed evidence showed that the person who took the adverse employment action – Leddy – had no knowledge that Webb had met with Isom, or engaged in a protected activity at that meeting, and thus there was no causal connection between the protected activity and the adverse employment action. (*See* App. at 16a-20a.)

Webb does not seriously dispute that he was unable to present evidence of any causal connection. Instead, Webb argues that that the Tenth Circuit erred in requiring evidence of a causal connection between Webb's protected activity and his inclusion in the RIF. (App. at 16a-20a.) Webb argues that the Tenth Circuit should have applied the standard adopted in *Stone v. City of Indianapolis Pub. Utils. Div.*, 281 F.3d 640 (7th Cir. 2002). According to Webb, under *Stone*, to establish a "prima facie case of retaliation, no causal connection need be demonstrated; plaintiff need merely show that comparators who did not complain about discrimination did not suffer the adverse action." (Pet. at 29.)

Webb misstates the standard adopted in *Stone*. *Stone* does not say that that a plaintiff must only show that others who did not complain about discrimination did not suffer an adverse employment action. It says that a plaintiff must show that after complaining about discrimination, "**only he, and not any similarly situated employee who did not [complain about discrimination], was subjected to an adverse employment action**. . . ." *Stone*, 281 F.3d 640, 644 (7th Cir. 2002) (emphasis added); *see also Hudson v. Chicago Transit Auth.*, 375 F.3d 552, 559 (7th Cir. 2004). Thus, under *Stone*, Webb would have to show that he complained of discrimination, and then only he was laid off. But in light of the fact that Webb was laid off as part of a RIF, in which 49 people were laid off, he could not make that showing. Thus, application of the standard in *Stone* would not alter the result in this case. Under either standard, Webb would not be able to show a prima facie case of retaliation.

Indeed, it seems unlikely that the Seventh Circuit would apply the indirect-evidence standard adopted in *Stone* to an action involving a RIF. Because a RIF, by definition, involves the layoff of multiple employees, no employee would be able to show that only he or she, and not any employee who did not complain of discrimination, "was subjected to an adverse employment action." Application of the *Stone* standard in the context of a RIF, therefore, would effectively shield employers from retaliation claims based on indirect discrimination.

CONCLUSION

As shown above, Webb has not identified any reason why it would be appropriate for this Court to grant the Petition. Accordingly, Level 3 requests that the Petition be denied.

Respectfully submitted,

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